No. 415.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

TERRENCE DRUGGAN, APPELLANT,

vs.

PALMER E. ANDERSON, UNITED STATES MARSHAL, ETC., AND WESLEY WESTBROOK, SUPERINTENDENT OF THE COOK COUNTY JAIL OF COOK COUNTY, ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF AND ARGUMENT FOR APPELLANT.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

The appellant, Terrence Druggan, is in the custody of the respondents, Palmer E. Anderson, United States marshal for the Northern District of Illinois, and Wesley H. Westbrook, superintendent of the Cook County jail of Cook County, Illinois, at the said county jail, by virtue of a mittimus (Rec., 5) executed by delivering the body of the appellant to the said jailer on November 11, A. D. 1924. (Rec., 6.) This mittimus issued pursuant to a judgment and order of the District Court of the United States for the Northern District of Illinois, finding the appellant guilty of contempt of court and sentencing him to imprisonment for one year in said Cook County jail,

and imposing upon him a fine of one thousand ($1,000) dollars and costs. (Rec., 25.)

The contempt proceedings, resulting in appellant's convicition, were instituted under the provisions of Sec. 24* of Title II of the National Prohibition Act (Rec.23) for the violation of a temporary injunction (Rec., 14) issued pursuant to the authority granted by Sec. 22 of Title II of said Act. (Rec., 6.)

On March 19, 1925, appellant filed in the District Court for the Northern District of Illinois, his petition for a writ of habeas corpus to secure his release from custody, alleging therein the unconstitutionality of Title II of the National Prohibition Act, upon grounds not heretofore urged or passed upon by this Honorable Court, or any of the District Courts of the United States, the unconstitutionality of Sec. 24 of said Title II, and the invalidity on jurisdictional grounds of the injunctional order which appellant was charged with violating. (Rec., 1.)

To this petition the respondents filed a demurrer. (Rec., 26.) After hearing arguments the District Court sustained the demurrer, dismissed appellant's petition and allowed an appeal direct to this Honorable Court. The opinion of the District Court is not reported. Appellant perfected his appeal and this Honorable Court, on motion of the appellant, has advanced the cause for hearing to October 5, A. D. 1925.

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*Sec. 24. In the case of the violation of any injunction, temporary or permanent, granted pursuant to the provisions of this title, the court, or in vacation a judge thereof, may summarily try and punish the defendant. The proceedings for punishment for contempt shall be commenced by filing with the clerk of the court from which such injunction issued information under oath setting out the alleged facts constituting the violation, whereupon the court or judge shall forthwith cause a warrant to issue under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. Any person found guilty of contempt under the provisions of this section shall be punished by a fine of not less than $500 nor more than $1,000, or by imprisonment of not less than thirty days nor more than twelve months, or by both fine and imprisonment.

Specification of Errors.

1. The District Court for the Northern District of Illinois erred in dismissing the petition for habeas corpus.

2. Said District Court erred in not holding that the appellant is wrongfully held and illegally imprisoned.

3. Said District Court erred in not holding that appellant is held and imprisoned without due process of law and in violation of the Fifth Amendment of the Constitution of the United States.

4. Said District Court erred in holding that the National Prohibition Act, excepting only Sections 1, 27, 37 and 38 of Title II thereof, upon which said Act, said judgment and conviction are based, is a valid and constitutional law; for the said Act is unconstitutional for the following reasons:

A. That Section 1 of the Eighteenth Amendment to the Constitution of the United States provides:

> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

B. That the Eighteenth Amendment was proposed to the Legislatures of the several states by the Sixty-fifth Congress, on the 19th day of December, 1917, and was, on the 16th day of January, 1919, ratified by the legislatures of three-fourths of the whole number of states in the United States and certified by the acting Secretary of State as valid to all intents and purposes as a part of the Constitution of the United States;

C. That the Supreme Court of the United States, in *Dillon* v. *Glos*, 256 U. S. 368, declared that the Eighteenth

Amendment to the Constitution of the United States went into effect on January 16, 1920;

D. That under Section 1 of the Eighteenth Amendment prohibition did not become effective and operative until one year from the date of its adoption by three-fourths of the whole number of states, that is to say, it became effective and operative on January 16, 1920;

E. That Congress was without constitutional power to legislate upon the subject of prohibition of intoxicating liquors until the Eighteenth Amendment became operative on January 16, 1920;

F. That the National Prohibition Act was passed over the president's veto on October 28, 1919, nearly three months before said amendment became operative;

G. That Title II of the National Prohibition Act having been passed prior to the time when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void;

H. That there is no provision in the Eighteenth Amendment giving to Congress power to legislate with reference to the subject-matter of said amendment prior to its effective date.

5. Said District Court erred in holding as valid and constitutional, Section 24 of Title II of the National Prohibition Act—the contempt section upon which the judgment complained of is founded. The court erred in so holding, for the following reasons:

A. That said Section 24 of Title II fixes an arbitrary maximum and minimum penalty, regardless of the degree of fault of the contemnor and is for that reason an unconstitutional interference with and invasion of the judicial power.

B. That the discretion of the chancellor in assessing penalties upon contemnors is destroyed by this section;

C. That the District Courts from their creation by the Act of 1831 came into existence clad with plenary power to vindicate their authority and to punish contemnors.

D. That said Section 24 invades, supersedes, limits and restricts the inherent plenary power of the District Courts to assess the penalty for contempts of their authority and is, therefore, an unconstitutional interference with and invasion of the judicial power.

E. That said Section 24 in its definition of an arbitrary maximum and minimum punishment without regard to the extent of the contemnor's fault is the creation of a new statutory crime to be tried by a court of equity without a jury and upon affidavits without confrontation of witnesses in violation of the Sixth Amendment to the Constitution of the United States.

6. Said District Court erred in not holding that the injunctional order, upon which the contempt proceedings were based, was obtained and granted without notice first given to appellant, and for that reason was illegal and void. The court erred in this for the following reasons:

A. That Equity Rule 73 provides that

> "No preliminary injunction shall be granted without notice to the opposite party."

B. That under Sections 913 and 917 of the Revised Statutes the Equity Rules are given the same force and effect as Acts of Congress.

C. That Section 22 of Title II of the National Prohibition Act, under which the bill for injunction aforesaid was instituted, provides that

> "Such action shall be brought and tried as an action in equity," etc.

D. That Equity Rule 73 applies to bills brought under Section 22 of Title II of the National Prohibition Act.

E. That the non-compliance with Equity Rule 73 went directly to the jurisdiction of the court to grant the temporary injunction aforesaid.

F. That the injunctional order so violating Equity Rule 73 is void and all of the contempt proceedings thereon and the judgment, sentence and fine therein are likewise null and void and of no legal effect whatever.

BRIEF.

Point I.

Title II of the National Prohibition Act, is unconstitutional and void. Sections 1, 27, 37 and 38 may be constitutional if they have reference only to Title I of the Act and trace their source of authority to the war powers of Congress.

A. The Eighteenth Amendment to the Constitution of the United States did not go into effect or become operative as a part of the Constitution until January 16th, A. D. 1920.

Dillon v. *Glos*, 256 U. S. 368.

Sec. 3, Title II, National Prohibition Act.

National Prohibition Cases, 253 U. S. 350.

Street v. *Lincoln Safe Deposit Co.*, 254 U. S. 88.

Cases cited and quoted from under Point I of Argument (*Infra*, p. . . .)

B. The Government of the United States is a Government of limited and defined powers. Congress has power to legislate only where it has constitutional authority to do so.

12 C. J., p. 742, Sec. 156, and U. S. Sup. Ct. cases there cited.

Conclusion: Title II of the National Prohibition Act having been passed October 27, 1919, prior to the time when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void.

Point II.

Section 24 of Title II is an invasion of the judicial power and therefore unconstitutional.

A. The power to punish for contempt is inherent in courts.

Bessette v. *Conkey Co.*, 194 U. S. 324, 326.
Ex parte Terry, 128 U. S. 289, 302.

B. Section 24 of Title II limits the discretion of the court in the fixing of penalties and thereby invades the inherent power of the court.

Ex parte Garner, 179 Cal. 409.
See Point II of Argument (*Infra*, p. 38.)

Point III.

Section 24 of Title II of the National Prohibition Act violates the Sixth Amendment to the Constitution.

See Argument under this point (*Infra*, p. 42.).

Point IV.

The Injunctional Order upon which the judgment is founded is absolutely void as District Courts are without power and are expressly prohibited by Equity Rule 73 from granting temporary injunctions without notice.

See Argument under this point (*Infra*, p. 49.).

ARGUMENT.

Point I.

A.

Title II of the National Prohibition Act, is unconstitutional and void. Sections 1, 27, 37 and 38 may be constitutional if they have reference only to Title I of the Act and trace their source of authority to the war time powers of Congress.

Leaving out of consideration of this brief, Sections 1, 27, 37 and 38 of Title II aforesaid, for they in nowise affect the rights of the appellant herein, the contention of the appellant that Title II of the National Prohibition Act is unconstitutional and void, may be reduced to the following syllogistic form:

A. The Eighteenth Amendment to the Constitution of the United States went into effect and became operative as a part of the Constitution of the United States on January 16, A. D. 1920.

Dillon v. *Glos*, 256 U. S. 368, 65 Law Ed. 994.

B. The Government of the United States is a Government of limited and defined powers. All national authority is derived from the Constitution of the United States, in which the powers of the Federal Government are enumerated.

12 C. J. p. 742, Sec. 156, and U. S. Sup. Ct. cases there cited.

Conclusion—Title II of the National Prohibition Act, having been passed October 27, 1919, prior to the time

when the Eighteenth Amendment went into effect, was passed without authority derived from the Constitution of the United States and is, therefore, unconstitutional and void.

The point here involved is not that a Legislative body may not pass a law *in praesenti* to become effective *in futuro*. The law is well settled that a Legislative body having power to legislate over a particular subject-matter may pass laws to become operative at a future date or on the happening of a future event; neither are anticipatory State statutes forbidden, unless there is, by the terms of the Constitution, a limitation on the Legislature to pass them. The objection here made, is, not that Congress passed the Volstead Act to go into effect *in futuro*, but that it passed it at all, at the time when it did pass it; that it had no power whatever, under the Federal Constitution, to pass any legislation with respect to the Eighteenth Amendment, until that amendment became effective and operative, as a part of the Constitution of the United States.

It is not here contended that the Eighteenth Amendment is unconstitutional; neither is it contended that Congress did not derive the power, impliedly, from Section I of the Eighteenth Amendment and, expressly, from Section II of the Eighteenth Amendment to enact legislation to make the amendment effective. It is conceded that Congress derived such power from the Eighteenth Amendment, but it is contended that at the time the National Prohibition Act was passed, such power was merely inchoate and *not vested* until January 16, 1920.

In *Dillon* v. *Glos*, 256 U. S. 368, the court said:

> "The provisions of the Act, which the petitioner was charged with violating, and under which he was arrested (Title II, Secs. 3, 26), were by the terms of

> the Act (Title III, Sec. 21) to be in force from and after the date when the Eighteenth Amendment should go into effect, and the latter *by its own terms* was to *go into effect* one year *after* being ratified. *Its ratification,* of which we take judicial notice, was consummated January 16, 1919." (Italics ours.)

That Congress regarded the Eighteenth Amendment as inoperative and ineffective until one year after its ratification, is clear from the language of Section 3 of Title II of the National Prohibition Act, which reads:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States *goes into effect,* etc., etc."

Likewise is it clear, from the language of Section 21 of Title III of the National Prohibition Act, which reads:

> "Titles I and III and Section 1, 27, 37 and 38 of Title II of this Act shall take effect and be in force from and after the passage and approval of the Act. The other sections of Title II shall take effect and be in force *from and after the date when* the Eighteenth Amendment to the Constitution of the United States *goes into effect.*"

That the Eighteenth Amendment did not become effective at the time of its ratification seems to be recognized also in the National Prohibition cases, 253 U. S. 350, when the court, in the 10th conclusion of its opinion, in referring to the power confided to Congress by Section II of the Eighteenth Amendment, said:

> "That power may be exerted against the disposal for beverage purposes of liquors manufactured *before the amendment became effective,* just as it may against subsequent manufacture for those purposes."

Likewise, in *Street* v. *Lincoln Safe Deposit Company,* 254 U. S. 88, the court said that the Eighteenth Amendment did not indicate

> "any purpose to confiscate liquors lawfully owned

> at the time the amendment *should become effective* and which the owner intended to use in a lawful manner."

Title II of the National Prohibition Act is, what is known as contingent legislation. The general rule with regard to contingent legislation is that a Legislature, whether state or national, *having the power* to pass a law *in praesenti* may make it effective *in futuro;* and with regard to many things what it may do immediately it may also do mediately; as was said in the *People* v. *Reynolds,* 10 Ill. (5 Gil.), p. 1, at p. 10:

> "Necessarily, regarding many things especially affecting local or individual interests, the Legislature may act either mediately or immediately."

See also *Ex parte* Wall, 48 Cal. 279 (315). The converse of this proposition ought also to be true, viz.: what a legislative body cannot do immediately it cannot do mediately; or, if a legislative body cannot pass an Act to become effective in the present, it cannot, in the present, pass an Act to become effective in the future, except that in most of the states, the several constitutions specifically provide for legislation, except in emergency cases, to become effective at a date subsequent to passage. A state legislature, when not otherwise limited by the state constitution, has a present plenary power to legislate, and may therefore pass an Act to become effective immediately or in the future, as it sees fit. Congress also, acting **under powers already granted** by the Constitution, may pass laws to become effective immediately or in the future, as it sees fit; but where Congress has not the power to pass an act **effective immediately,** it should not be held to have authority to pass an Act, effective in the future, when it would receive such authority.

Certain it is that Congress has no power to make

Title II effective immediately. The inhibitions of the National Prohibition Act which became effective immediately on the passage and approval of that Act, were "permissible *only because* in the opinion of Congress the war emergency demands it." *Ruppert* v. *Caffey*, 251 U. S. 264 (301). Not having the authority to pass Title II to become effective immediately, Congress had no power to pass Title II at all on October 27, 1919, for it could not anticipate the grant of power conferred by an Amendment which was not to go into effect until January 16, 1920. What it could not do immediately, it could not do mediately; what it could not do presently, it could not do prospectively. If it had power to pass an Act effective in the future, it had power to pass such Act effective in the present. If the latter power be denied, so also must the former be denied.

The decision in *Dillon* v. *Glos*, 256 U. S. 368, 65 L. Ed. 994, to the effect that the Eighteenth Amendment went into effect one year after its ratification, is supported by a number of decisions construing statutory enactments, and, we see no reason why the same rules of construction as are applied to a statute, should not be applied to a constitution or a constitutional amendment. A valid statute is just as much the law as is a valid constitutional amendment. Applying then the rule, as applied to statutes, it can safely be said that the constitutional amendment did not become the law of the land upon its ratification January 16, 1919, but became the law of the land only when it went into force and effect on January 16, 1920. That the Eighteenth Amendment did not become the law of the land until January 16, 1920, and that until then it granted no power, conferred no authority and imposed no obligation or duty, will more fully appear from the cases hereafter cited and quoted from.

"A statute has not, *ex proprio vigore*, any force until it becomes the law of the land, and that is when, by its terms, it takes effect."

Neisel v. *Moran*, 80 Fla. 98.

Gilbert v. *Ackerman*, 159 N. Y. 118.

In re Howe, 112 N. Y. 100.

36 Cyc. 1192, Notes 6, 7.

City of Davenport v. *R. R. Co.*, 37 Ia. 624.

Jackman v. *Garland*, 64 Me. 133.

"A statute passed to take effect at a future day, is to be understood as speaking from the time it goes into operation, and not from the time of its passage."

Price v. *Hopkins*, 13 Mich. 318.

Rice v. *Ruddiman*, 10 Mich. 125.

"No statute has, *ex proprio vigore*, any force until it becomes the law of the land."

Cargill v. *Power*, 1 Mich. 369, 370.

Charles v. *Lamberson*, 1 Ia. 435, (443).

State v. *Bentley*, 80 Kan. 227.

Shook v. *Laufer*, 100 S. W. (Tex. Civ. App.) 1042.

State v. *Williams*, 173 Ind. 414.

Mills v. *State Board*, 135 Mich. 525.

"Until the time arrives when it is to take effect and be in force, a statute which has been passed by both houses of the Legislature and approved by the executive has no force whatever for any purpose."

36 Cyc. 1192, Notes 6, 7.

State v. *R. R. Co.*, 36 Mont. 582.

See also:

In re Alexander, 53 Fla. 647.

Thompson v. *State*, 56 Fla. 107.

Neisel v. *Moran, supra.*

Schneider v. *Hussey*, 2 Idaho (Hasb.) 8.
Harding v. *People*, 10 Colo. 387.
Churchill v. *Bemis*, 45 Neb. 724.
Rogers v. *Voss*, 6 Ia. 405.
Scales v. *Marshall*, 96 Tex. 140.
State v. *Mounts*, 36 W. Va. 179.

In *State* v. *Dircks*, 211 Mo. 568, the court said:

> "While the amendment *became a part* of the Constitution of this State from the time of the canvass of the vote thereon by the Secretary of State in 1906, *by its terms*, it was not to have actual operation and practical effect, until the election in 1908, the first time when an election for sheriff was to be held under its provisions. That a statute or constitutional provision may have a *potential existence*, but which will not go into actual operation until a future time, is familiar law."

In *Seneca Mining Co.* v. *Secretary of State*, 82 Mich. 573, the court said:

> "Without the authority conferred upon the legislature by this amendment to the Constitution, the Legislature would have no authority to authorize the extension of corporate existence, such as this. The important question, which is, therefore, presented is, when would the amendment adopted by the electors in April, 1899, *take effect as a part of the Constitution?* We must look to that instrument for a reply." (Italics ours.)

In *State ex rel. Stevenson* v. *Tufley*, 20 Nev. 427, the court said:

> "An act of the Legislature which is not authorized by the State Constitution at the time of its passage is absolutely null and void. It is a misnomer to call such an act a law. It has no binding authority, no vitality, no existence."

Speaking of the effective date of a constitutional amendment, the court, in *People* v. *Gardner*, 59 Barb. 198, at p. 205, said:

> "It is suggested that the new judiciary article (Article 6, *supra*) was 'adopted' when the state canvassers had completed their canvass of the votes. Undoubtedly the electors had adopted the article. They had done all they were authorized by law, to do; but the article was not to become law until a future day. Until that time arrived it was silent and affected no one."

This last case was affirmed in *People* v. *Gardner,* 45 N. Y. 812, where the court, in referring to Article 6, *supra,* which was adopted by the people in November, 1869, said, page 814:

> "* * * the new judiciary article took effect upon the first day of January, 1870, and on and from that day *became operative* as a provision of organic law."

To the same effect, see *People* v. *Norton,* 59 Barb. Sup. Ct. Rep. (N. Y.) 169; *Real* v. *People,* 42 N. Y. 270.

In *Correllis* v. *State,* 78 Fla. 44, the court had under consideration an amendment to the State Constitution, which prohibited the manufacture, sale, etc., of intoxicating liquors. The constitutional amendment was in three sections and is substantially similar in all respects to the Eighteenth Amendment to the Constitution of the United States. Among other things, the court said:

> "**By the terms** of this amendment it was to 'go into effect on the first day of January, A. D. 1919.' This of itself rescued the amendment from the provisions of Article 17, by which amendments to the Constitution become effective upon receiving the approving majority of the votes of the electors at the election * * *."

This case was followed by *Neisel* v. *Moran,* 80 Fla. 98. This case is substantially on all fours with the case now presented by the appellant. The prohibition amendment

to the Constitution of Florida is substantially similar in all respects to the Eighteenth Amendment. The act of the Florida Legislature to make effective the amendment to the Florida Constitution is, or was, at the time this decision was rendered, substantially similar to the National Prohibition Act and was passed, as was the Volstead Act, in anticipation of the amendment becoming effective. The Florida act was declared constitutional, however, but it was found to be valid because of the plenary power residing in State legislatures to pass any law *not forbidden* by the State Constitution. In making this case applicable to the contention of the appellant here made, it is important to note the distinction made by the Florida court between Federal power and State power. The court said:

> "The Supreme Court of the United States has held the act of Congress of October 28th, 1919, known as the Volstead Prohibition Enforcement Act, to be a valid law, *although it was passed by Congress before the Eighteenth Amendment to the Federal Constitution became effective,* on January 16th, 1920, and although Congress *has no Legislative power except such as is granted* to or conferred upon it by the Constitution of the United States. *Rhode Island* v. *Palmer*, 252 U. S. ——, 40 Sup. Ct. 486. If the Volstead Federal Enforcement Statute, enacted October 28th, 1919, after the Eighteenth Amendment to the Federal Constitution had been adopted by the Legislatures of three-fourths of the States of the Union, *but before the amendment became effective,* January 16th, 1920, is a valid law, *when the Congress has no power* to enact laws, except as that power is granted by the Federal Constitution, then Chapter 7736, Laws of Florida, is a valid law, for the reason that the Legislature may enact any statute that is not forbidden by the State or Federal Constitution, etc."

Rhode Island v. *Palmer*, cited by the court, *supra,* was not decided in 252 U. S., but was one of the national pro-

hibition cases decided in 253 U. S. 350, and the court was under a misapprehension, when it took for granted, that the point in question was decided by the Supreme Court of the United States in that case. It is pointed out hereafter under Point I (B) of this Argument, that the point made by the contention of the appellant herein, was not decided in *Rhode Island* v. *Palmer,* or in any other case decided by the Supreme Court of the United States, which we have been able to find. It is worthy of note that the Florida court, apparently wishing to emphasize the correctness of its holding, drew the *a fortiori* conclusion, that if Congress, *without power* granted to it by the Federal Constitution, could pass a law, in anticipation of receiving that power, when the Eighteenth Amendment should become effective, then the Legislature of Florida had a right to pass the Statute in question. The language of the court signifies to our mind that the court, under the misapprehension that this point was decided by the Supreme Court of the United States, at least doubted the correctness of the decision, which it thought the United States Supreme Court had rendered in that case. In *Dunn* v. *County of Rock Island,* 283 Ill. 628 (636), it is said:

> "Upon the facts stated it is argued that if the Act prevents the building of the jail it is retroactive and an interference with constitutional rights. The act did not go into effect until July 1st, 1915, but under section 10* of Article 5 of the Constitution the act *became a law* of the State *upon its approval* by the Governor. The Act is to be construed as prospective, and its prohibition was not effective until July 1st, 1915. A statute passed to take effect at a future day is operative from that day and the intervening period is allowed to enable the public to become acquainted with its provisions, but until it *becomes operative as a law* the public are not compelled to govern their actions by it."
>
> ——*Misprint for Section 16.

See, also, *Board of Supervisors* v. *Keady*, 34 Ill. 293.

In *Pratt* v. *Allen*, 13 Conn. 119, the court said, at page 125:

> "The objection is, that since the amendment giving the election of sheriffs to the people, also directs that such election shall be made, in such manner as shall be prescribed by law, the Assembly must derive their power from this amendment; and as the Act of May, 1838, was prior to the final adoption of the amendment by the people, it was prior to the existence of power in the assembly, and so the act is void; in other words, that the amendment was a grant of power to the Legislature to legislate upon the subject; and that until the amendment received its consummating act, by the vote of the people, no power was conferred by it upon the Legislature. The objection proceeds upon the assumption that the Constitution of this State, *like that of the United States* confers upon the legislative department all the power it possesses; whereas, the fact is not so. The Constitution of the United States is a grant of powers, *where they did not before exist*; the Constitution of this State is a *limitation* of powers already existing."

In *Owing* v. *Speed*, 5 Wheaton Rep. 420, Chief Justice Marshall held that an act, passed by the State of Virginia, with reference to certain lands was not void as being in conflict with Section X of Article I, of the Federal Constitution, prohibiting a state from passing "any law impairing the obligation of contracts." In urging this case, in support of the contention of the petitioner, we call the court's attention to the fact that Article 7, of the Constitution of the United States provides that "the ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." Virginia was among the nine States first ratifying. New Hampshire was the ninth State to ratify and this it did, June 21st, 1788, and thereupon the Constitution of the

United States became established. Subsequently, but before March 4th, 1789, the act of the Virginia Legislature was passed, but it was held to be valid because the Constitution of the United States in its entirety did not go into effect until March 4th, 1789.

In 28 Cyc., p. 365, it is said:

> "A municipal charter in whatever form is a statute of the State, and the organic law of the corporation. It gives the municipality its power to enact by-laws, just as the Federal Constitution gives the Congress its power of legislation."

Bearing in mind this analogy between the power of a municipality and the power of Congress, we cite the case of *Ellis* v. *City of Cleburne,* 35 S. W. (Tex.) 495, (writ of error denied by the Supreme Court.) The Constitution of Texas provided that—

> "If it shall appear from the election returns that a majority of votes have been cast in favor of any Constitutional Amendment, the said Amendment *shall become a part* of the Constitution and proclamation shall be made by the Governor thereof."

The court held that an amendment to Article 8 of the Constitution, authorizing certain cities to incur indebtednesses for the erection of water works, which was adopted by a vote of the People on August 14, 1883, and the result proclaimed by the Governor on September 25, 1883, was not *in effect* on September 13, 1883, so as to authorize a city *on that date* to incur an indebtedness for the erection of certain water works. The court held in substance the following propositions:

> A. An Ordinance is without authority and void which is passed in anticipation of a Constitutional Amendment, which, when effective, would confer such authority.
>
> B. A contract made by the City was not valid by reason of having been made in anticipation of the adoption of the Amendment.
>
> C. If the Ordinance, authorizing the execution of

the contract, was enacted *before* the Constitutional Amendment *became operative,* and was, therefore, invalid, the contract based upon the Ordinance was likewise void, even though it was not delivered until October 1, 1883, after the Amendment became operative.

D. A City cannot ratify a contract which at the time it was entered into was *ultra vires.* A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority. (Citing Dillon on Municipal Corporations, 4th Ed., Sec. 463.) No subsequent Act can make an *ultra vires* contract effective.

To the same effect, see *Reade* v. *City of Durham,* 173 N. C. 668; *City of Duluth* v. *Duluth St. Ry. Co.,* 60 Minn. 178.

We have cited and quoted excerpts from the principal cases supporting the contention of the appellant. Other cases to which we respectfully refer the court are:

Price v. *Hopkins,* 13 Mich. 318.

Bilbrey v. *Poston,* 63 Tenn. 232.

Girdner v. *Bryan,* 94 Mo. A. 27.

Phy v. *Wright,* 75 Ore. 428.

Schwartz v. *Leiberman & Co.,* 2 Tex. App. Civ. Cases, Sec. 289.

Hamilton v. *Vaughan,* 204 Mich. 439.

DeWar v. *People,* 40 Mich. 401.

State v. *Cain,* 52 La. Ann. 2120.

State v. *Schnitzer,* 16 Wyo. 479.

State v. *Kyle,* 166 Mo. 287.

Lloyd v. *Hamilton,* 52 La. Ann. 861.

Point I.

B.

Objections Answered.

(1) The Supreme Court of the United States has not had this objection to the validity of Title II of said act presented to it in any case heretofore arising. It was not passed upon in *Rhode Island* v. *Palmer,* or any of the other cases included within the *National Prohibition* cases, 253 U. S. 350. In those cases the contention that the Volstead Act was invalid, was, as we read the decision, based upon the major contention that the Eighteenth Amendment itself was unconstitutional. The court at the outset in those cases said:

> "We here are concerned with seven cases involving the validity of that amendment and of certain general features of the National Prohibition Law, known as the Volstead Act."

Mr. Justice McKenna, in his dissenting opinion, said:

> "This case is concerned with the Eighteenth Amendment to the Constitution of the United States, its validity and construction."

Neither was it decided in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 164. The contention there was that the Eighteenth Amendment denied to Congress, before its effective date (January 16, 1920), the power to pass any prohibition of the liquor traffic, the argument being that the amendment guaranteed to manufacturers and dealers a year's grace. The decision of the court (p. 164) was to the effect that the Eighteenth Amendment was not a denial of the war power of Congress; the only point decided was that Congress had power to pass such prohibition *as a war measure* for the conservation of the resources of the country, and that the Eighteenth

Amendment did not operate to destroy or curtail that power.

In *Ruppert* v. *Caffey*, 251 U. S. 264, Elihu Root and William D. Guthrie argued that:

> "The language of the Eighteenth Amendment presents a very grave question as to the power of Congress to enact prohibition legislation *effective before* the expiration of one year from the ratification of that amendment."

It will be noted that the objection merely went to the power of Congress to pass such legislation *effective immediately*, and involved only Title I of the Volstead Act, counsel taking it for granted that Title I was passed pursuant to the provisions of the Eighteenth Amendment. The objection did not assert the lack of a then present power in Congress to legislate at all on the subject. The court held that Title I was not passed pursuant to the Eighteenth Amendment, but pursuant to the war powers of Congress. The court said, page 301:

> "Prohibition of the manufacture of malt liquors with an alcoholic content of one-half of one per cent or more, is permissible *only because* in the opinion of Congress the war emergency demands it."

Objections Answered (Cont'd).

(2) Article 5 of the Constitution of the United States, which provides that amendments when ratified by the Legislatures of three-fourths of the states "shall be valid to all intents and purposes, as part of this Constitution," in nowise negatives the construction here contended for by petitioner, viz: that the Eighteenth Amendment did not become *an operative* or *effective* part of the Constitution until January 16, 1920. Such construction is consistent with the provisions of Article 5. If the Eighteenth Amendment had specified no time when it was to go into effect, it undoubtedly would have become operative, immediately upon its ratification under the provisions of Article 5. To paraphrase the language of the Supreme Court of Florida, in *Correllis* v. *State,* 78 Fla. 44 (heretofore quoted):

> "By the terms of this Amendment it was to go into effect on the 16th of January, 1920. This of itself rescued the Amendment from the provisions of Article 5."

The Eighteenth Amendment upon its ratification became no doubt a part of the Constitution and was valid to all intents and purposes, but until January 16th, 1920, it did not go into effect; it was unenforceable; it did not become an *operative* part of the Constitution; it lay dormant; suspended; *ex proprio vigore* it had no force; its existence as law was potential; it was silent and affected no one; it vested no power. The situation presented has its analogy in state statutes and state constitutional amendments. Speaking of a constitutional amendment the court in *State* v. *Cain,* 52 La. Ann. 2120, said:

> "* * * it and every part of it was intended to lie dormant and directed to lie dormant until, etc.; * * * everything pertaining to the article, * * * was suspended until, etc."

And the court, in *State* v. *Dircks,* 211 Mo. 568 (*supra*), also speaking of a constitutional amendment, said:

> "While the amendment *became a part* of the Constitution from the time of the canvass of the votes, * * * *by its terms,* it was not to have actual operation and practical effect until, etc. * * * That a statute or *constitutional provision* may have a *potential existence,* but which will not go into actual operation until a future time, is familiar law."

State statutes are generally passed and approved prior to their effective dates. By the Constitution of Illinois, for instance, laws take effect on the first day of July next after their passage, unless an emergency exists. After their passage and approval they become *a part* of the statutes of the State, and unless they offend against some constitutional provision, they become valid law; but until the time arrives when they shall go into effect, they confer no power, speak with no authority, are silent and affect no one. Such was the holding in *Dunn* v. *County of Rock Island,* 283 Ill. 628 (636 heretofore quoted). In the case last cited, it was held that until a law becomes operative as a law the people are not compelled to govern their actions by it.

So with the Eighteenth Amendment. It became a part of the Constitution under Article V upon its ratification, but it did not *become operative* as law until, by its own terms, it went into effect January 16th, 1920. The intervening period was allowed to enable the public to become acquainted with its provisions, and to adjust itself to its inhibitions. During that period it was apparently intended by the legislatures of those States which ratified it, to be altogether operative or else altogether inoperative. There is no language in any of its sections which would make it operative for one purpose and inoperative for another. Nowhere does it specify that

Congress should have authority to pass legislation under it to become effective prior to the expiration of the one year period of limitation fixed in section 1. Certain it is, at least, that the amendment as law was inoperative to grant Congress power to enact Title II of the National Prohibition Act to become effective immediately on its passage. As it was inoperative for that purpose, it was, during the period between ratification and January 16th, 1920, inoperative altogether. Congress, having no constitutional authority to enact Title II of the Volstead Act to become effective immediately, had no constitutional authority in October, 1919, to make Title II effective in the future. As heretofore stated, a State Legislature under its plenary power may enact a statute which, while it becomes law immediately upon passage and approval, does not come to life until the time fixed by the State Constitution; but unlike a State Legislature, the very power of Congress to legislate does not come to life or into being until a constitutional amendment goes into effect.

Under Article V of the Constitution, the Eighteenth Amendment upon ratification might have become "valid to all intents and purposes as part of this Constitution" without having granted to Congress any power whatever. Witness for instance the Ninth, Tenth and Eleventh Amendments, which are completely self-executing in their provisions and in their nature, grant no power to Congress and yet became "valid as part of the Constitution" upon ratification. Suppose that the Eighteenth Amendment had been submitted and ratified in such form as to be completely self-executing in its porvisions, with its present Section 1, unaltered and an added provision specifically denying to Congress power to legislate on the subject of intoxicating liquors. Or suppose such amendment without a provision specifically deny-

ing that power of Congress; for, if the amendment were completely self-executing, it would impliedly deny such power to Congress anyway. Would anyone doubt, but that, upon ratification, the amendment, as supposed, became "valid to all intents and purposes as part of this Constitution" under Article V? And would anyone doubt but that also such amendment, while "valid as a part of the Constitution" upon ratification, remained inoperative until January 16th, 1920? If the amendment, as supposed, could deny power altogether to Congress to legislate, and, at the same time, be consistent with Article V, then there is no good reason why the amendment, as ratified, was not consistent with Article V, while remaining inoperative to grant power to Congress to legislate until January 16th, 1920. In fact, if the self-executing provisions of the amendment, as supposed, would remain inoperative until January 16th, 1920, it would seem, *a fortiori*, that the power granted to Congress, by the amendment as ratified, to execute its provisions, should remain inoperative until January 16th, 1920.

Perhaps the situation presented by the Eighteenth Amendment in its relation to Article V of the Constitution can best be described as being comparable to the National Bankruptcy Act in its relation to State Insolvency Statutes. The going into effect of a Federal bankruptcy act automatically *suspends* the operation of a state insolvency statute covering the same ground. It is said in 14 R. C. L., p. 633:

> "But a State statute is not thereby repealed; its *operation is only suspended* during the period the national act remains in force. On the repeal of the Bankruptcy Act a State insolvency statute comes in operation without re-enactment and applies to acts occurring during its suspension. * * * It is not the passage of the federal act, but it is the taking effect thereof, which suspends the State statutes.

> The State courts may continue to conduct insolvency proceedings during the interval between the passage of the act and the time set for its effect. * * * Even during the operation of a federal act, a State Legislature may pass an insolvency act. Such an act, as to the subject matter, covered by the federal act, will remain ineffective until the repeal of the latter, but then comes into force."

In other words, the State insolvency laws, where they do not offend against some provision of the State or Federal Constitution, are "valid to all intents and purposes as part of the statutes of the State," while at the same time, during the period a federal act is in force, they are unenforceable, inoperative, confer no authority, grant no power, are silent and affect no one; they exist potentially but are of no force or effect whatever. So with the Eighteenth Amendment. Upon its ratification it was "valid to all intents and purposes as part of the Constitution," while at the same time, during the interval between ratification and January 16th, 1920, when as said in *Dillon* v. *Glos, supra,* the amendment, "by its own terms was to go into effect," the several state statutes regulating the manufacture and sale of intoxicating liquor were in full force and effect *as supreme law* within each particular state, and *the operation* of the Eighteenth Amendment *was suspended* until January 16th, 1920.

That an amendment may be ratified pursuant to the provisions of Article V of the Constitution, thereby becoming valid as part of the Constitution, and at the same time be inoperative, is further evidenced by the provisions of Section 3 of the Eighteenth Amendment, which reads:

> "This article shall be *inoperative* unless it shall have been ratified as an amendment to the Constitution, within seven years from the date of the submission hereof to the states by the Congress."

Article V of the Constitution fixes no limitation of time for ratification; it simply provides that an amendment when ratified by three-fourths of the States shall be valid as part of the Constitution. Hence, we take it, that if the Eighteenth Amendment had not been ratified within the seven year period of limitation, but had been ratified shortly thereafter, it would have nevertheless been valid under the provisions of Article V as a part of the Constitution, although of course an inoperative part of it. Congress apparently took for granted that the amendment, no matter when ratified, would become *valid as part* of the Constitution in accordance with the provisions of Article V upon ratification by three-fourths of the States, even though the amendment might expressly declare otherwise. Manifestly the word "inoperative" was used advisedly. The words "invalid," "void," "shall not be valid as a part of the Constitution unless, etc." would have run counter to Article V, since under that article the amendment would, no matter what words were used, be valid as part of the Constitution. But the word "inoperative," appearing in Section 3 of the Eighteenth Amendment, is not inconsistent with the words "valid as part of" appearing in Article V of the Constitution. As already pointed out, State insolvency laws are "valid as part of State statutes," although *inoperative* when touching the same subject matter as a federal bankruptcy law. So a State statute may become *a valid law* when passed and approved although inoperative until a future day when *it is to go into effect.*

Dunn v. *County of Rock Island*, 283 Ill. 628 (*supra*).

If the Eighteenth Amendment could *by its own terms* fix, in one section, a period of limitation, after which it would be *inoperative*, even though ratified subsequently to the period thus fixed, then no good reason appears,

why the amendment could not *by its own terms* also fix, *in another section, a period of limitation* within which, after ratification, it would be *inoperative.* And this we contend it did, fixing by virtue of section one (1) the period of one year within *which, after ratification, it* was to be *inoperative.*

Objections Answered (Cont'd).

(3) It will not do to say that the prohibition of the Eighteenth Amendment went into effect January 16th, 1920, but that the Eighteenth Amendment itself went into effect when ratified, on January 16th, 1919, or to put it another way, that the prohibitory portion of the Eighteenth Amendment went into effect January 16th, 1920, while the Eighteenth Amendment itself went into effect when ratified. This, for the reason, that the prohibition of the Eighteenth Amendment is not one thing and the Eighteenth Amendment another thing. The prohibition *is* the Eighteenth Amendment, and the Eighteenth Amendment *is* the prohibition. The Eighteenth Amendment has no existence, except as a prohibitory law. It is incorrect and misleading to speak of the "prohibitory portion" of the Eighteenth Amendment. The amendment is an indivisible unit and cannot be divided into parts or portions; as was said in *Board of Supervisors* v. *Keady*, 34 Ill. 293 (296):

> "The court is not aware of any rule by which an act of the Legislature, regulating the rights and duties of citizens, becomes a law, piece-meal * * *."

The purpose of the Eighteenth Amendment was to prohibit intoxicating liquors. If the amendment was ineffective for that purpose until January 16th, 1920, then, until that time arrived, it was ineffective for the entire object of the law.

See *People* v. *Rose*, 166 Ill. 422 (430).

Objections Answered (Cont'd).

(4) It will not do to say that the Eighteenth Amendment became effective as an *operative* part of the Constitution, when ratified by the Legislatures of three-fourth of the States, and that it merely fixed a time in the future for the inhibition of liquors, for if so, it became by virtue of Section 2, Article 6, of the Constitution of the United States the supreme law of the land. And necessarily, if so, it became the supreme law of the land the moment it was ratified. But by Article 10 of the amendments to the Constitution, the powers not delegated by the States were reserved to them. If, therefore, in the interim between the ratification of the Eighteenth Amendment, and the date when it went into effect, to-wit, January 16th, 1920, a State had passed a law or had adopted an amendment to its Constitution, self-executing in its provisions, regulating the manufacture and sale of intoxicating liquors, it would scarcely be contended that such law, or such amendment, would be in violation of the Eighteenth Amendment, as that amendment *by its terms* did not go into effect until January 16th, 1920. Such a law, or such an amendment, would not be in conflict with the Eighteenth Amendment, because no question of conflict could arise until there was a law *in force and effect* which would give occasion for the conflict. The situation thus described is also paralleled by the operation and effect of State insolvency laws in their relation to the National Bankruptcy Act. The law in reference thereto is stated in 14 R. C. L., p. 633, as follows:

> "The State courts may continue to conduct insolvency proceedings *during the interval between* the passage of the act and *the time set for its effect.*"

Such a law, or such an amendment, would, under the

provisions of Article 10 of the amendments to the Constitution of the United States, be the supreme law within the State which enacted or adopted it. If so, the Eighteenth Amendment would not be the supreme law of the land within that State; but this cannot be, for there cannot be two supreme laws. Therefore, we must conclude that in the interim existing between the ratification of the Eighteenth Amendment and the 16th of January, 1920, the Eighteenth Amendment was not the supreme law of the land, and, therefore, was not an *operative* part of the Constitution of the United States.

Objections Answered (Cont'd).

(5) It will not do to say that Section 2 of the Eighteenth Amendment conferred power on Congress to pass Title II of the National Prohibition Act in October, 1919.

Section 2 of the Eighteenth Amendment provides:

> "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

This section was ratified as an integral part of the Eighteenth Amendment. It was not ratified separately. It was an inseparable unit in an indivisible article. It added nothing to the power of Congress.

Its sole efficacy was to allow the several States the exercise of their original police power, not inconsistent with the first section of the Eighteenth Amendment.

See *U. S.* v. *Lanza*, 260 U. S. 377.

Whatever power Congress has to regulate the traffic in intoxicating liquors it received from the Eighteenth Amendment as a whole, and not from Section 2; as was said in *U. S.* v. *Cohen*, 268 Federal, 420 (Dist. Ct. E. D., Mo.), at page 425:

> "It may be considered that the provisions of the Volstead Act in so far as they provide for the exercise of police powers by the Congress, would have been unwarranted and unconstitutional before the adoption of the Eighteenth Amendment."

The second section of the Eighteenth Amendment, insofar as it relates to the power of Congress, merely confirmed the implied power which it received from Section 1, of the amendment.

See *Ex Parte Crookshank*, 269 Fed. 980, where, at page 986, the court said:

> "The truth is, in my judgment, that too much concern seems to have been manifested because of the incorporation of Section 2 into the Eighteenth Amendment. The power thereby sought to be conferred upon Congress would have been conferred by the adoption and ratification of Section 1 alone; a power being accorded to the Federal Government, Congress even in the absence of an express grant, would be authorized to legislate in the exertion of that power."

See, also, paragraph 18, section 8, of Article 1, of the Constitution of the United States. The court, in *Ex Parte Crookshank,* also quotes from Hamilton's 31st Number of the Federalist, as follows:

> "It may be affirmed with perfect confidence, that the continual operation of the intended Government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers."

In the *National Prohibition cases,* 253 U. S. 350, the court said:

> "I take it that if the second section of the article did not exist, no one would gainsay that the first section in and of itself, granted the power and imposed the duty upon Congress to legislate to the end that by definition and sanction the amendment would become fully operative."

It will be noted that when the Supreme Court, in *Dillon* v. *Glos,* 256 U. S. 368, 65 L. ed. 994, said that the Eighteenth Amendment, "by its own terms was to go into effct one year after being ratified," it spoke of the article as a whole; presumably, the court meant that Section 2 went into effect at the same time that Section 1 went into effect. This rule of construction is supported by the authorities.

In speaking of the constitutional provision to the effect that an act of the Legislature should not become a law until the expiration of sixty (60) days from the end of the session (such was the law in Illinois prior to 1870), the Supreme Court of Illinois, in *Wheeler* v. *Chubbuck,* 16 Ill. 361, held, that:

> "In order to take an act out of the constitutional provision the Legislature must direct that the act, as a whole and entirety, shall take effect at a different time; and that it is not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period."

The court, on that occasion, said, that

> "the direction must be made in a clear, distinct and unequivocal provision, and could not be helped out by any sort of intendment or implication."

In *Schneider* v. *Hussey,* 2 Idaho (Hasb.) 8, it is said:

> "It will not be contended that one section of an act will take effect or be in force at an earlier date than other sections, unless the act itself shall so state."

To the same effect, see, also, *State* v. *Williams,* 173 Ind. 414; *State* v. *Paul,* 87 Wash. 83; *McArthur* v. *Franklin,* 16 Ohio State, 193, 203; *Leyner* v. *State,* 3 Ind. 490; *Grant* v. *Alpena,* 107 Mich. 335; *State* v. *Edwards,* 136 Mo. 360; *Ex Parte AhPah,* 34 Nev. 283.

Objections Answered (Cont'd).

(6) It will not do to say that the Eighteenth Amendment, by becoming effective January 16th, 1920, validated the act of Congress of October, 1919.

In *State ex rel. Stevenson* v. *Tufley,* 20 Nev. 427, it is said:

> "The act being void, no subsequent adoption of an amendment to a Constitution, * * * would have the effect to infuse life into a thing that never had any existence."

To the same effect see:

Newberry v. *U. S.,* 256 U. S. 232 (254).

See, also, *Girdner* v. *Bryan,* 94 Mo. A. 27.

Ellis v. *City of Cleburne,* 35 S. W. (Tex.) 495, to the effect that no subsequent act can make an *ultra vires* act effective.

See, also, *DeWar* v. *People,* 40 Mich. 401.

Point I.

C.

Conclusions.

We conclude, therefore, that when Congress attempted to pass Title II of the National Prohibition Act, in October, 1919, it was endeavoring to make operative and effective an amendment which itself at that time, was inoperative and ineffective for any purpose, and vested in Congress no power until January 16th, 1920, to pass any laws pursuant to it.

We conclude also that Article V in no way conflicts with the construction, which we here contend should be given to the Eighteenth Amendment, viz: that upon ratification it became valid as a part of the Constitution, but did not then become an operative or effective law.

We believe that we have established, on reason and authority, that Title II of the National Prohibition Act is in conflict with Section 1, of Article I, of the Constitution of the United States, providing that "all legislative powers herein granted shall be vested in a Congress of the United States, etc.," in that, the power sought to be exercised in October, 1919, was not one of the powers granted to Congress at that time; and is also in conflict with Section 8, of said Article I, which enumerates the powers of Congress, in that, the power sought to be exercised by Congress in October, 1919, is not enumerated among the powers granted to Congress by Section 8 of said Article I, and was not granted by any of the amendments to the Constitution of the United States in force and effect at the time Congress sought to enact Title II of the National Prohibition Act. The conclusion follows, that Title II of the National Prohibition Act is unconstitutional and void.

Point II.

Section 24 of Title II is an Invasion of the Judicial Power.

The legislative intent in drafting Section 24 of Title II of the National Prohibition Act was to provide for an expeditious mode of trying the many cases, which Congress prophesied would arise in the enforcement of the act. Hence the provision for trial without a jury before a chancellor and all under the guise and label of "contempt."

With the federal jurisdiction created by the Eighteenth Amendment, the Districts Courts are burdened by Section 24, with what was, prior thereto, the business of state police courts. So far reaching is the newly created federal police jurisdiction, that nothing is left to the con-

trol of the courts. Not even are the district courts permitted to exercise plenary discretion in trying contemptuous violations of injunctional orders under the act.

Section 24 provides:

> "Any person found guilty of contempt under the provisions of this section shall be punished by a fine *of not less* than $500 *nor more than* $1,000 or by imprisonment of *not less* than thirty days *nor more* than twelve months or by both fine and imprisonment."

Thus, if the evidence in a proceeding under Section 24 discloses that the contemnor was guilty of a trivial violation of the injunctional order, the chancellor could do nothing but fine the contemnor not less than $500 or imprison him for not less than thirty days. And this, though the court thought that a fine of $25 or imprisonment for two days was ample punishment for the infraction of the injunctional order.

As ancient as the courts themselves, is the power to punish contemnors of the authority of the judiciary. A court without power to compel obedience to its orders would be a useless institution. As said by Mr. Justice Brewer, in *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, at page 326:

> "The power to punish for contempt is inherent in all courts. * * * (327). The purpose of contempt proceedings is to uphold the power of the court, and also to secure to suitors therein the rights by it awarded."

The law of the land is synonomous with the maintenance of the authority of the courts. Only by obedience to judicial mandate can personal and property rights be secure. Leave to personal choice obedience to judicial authority, and law and order would soon be chaos.

The very nature and purpose of a court, inherently

demands the power to punish for contempt. That power transcends legislative limitation and is not derived from any statute.

See *Ex Parte Terry*, 128 U. S. 289, 302.

The judicial power of the Federal Government is defined by Article III, Section 1 of the Constitution:

> "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

And Article I, Section 8, par. 9 of the Constitution provides that Congress shall have power

> "To constitute Tribunals inferior to the Supreme Court."

Congress did exercise that power by the Act of 1831 creating the District Courts. In that act (now Section 268 of the Judicial Code) Congress defined the particular instances wherein the District Courts could exercise the power to punish for contempt; but did not in any wise interfere with the power of those courts fully to exercise that power in the particular instances listed in the act. In other words, the Act of 1831 is not a limitation upon the extent of the power to punish for contempt, but is a specification of the instances where the power may be exerted.

See *Interstate Com.* v. *Brinson*, 154 U. S. 447; *in Re Cuddy*, 131 U. S. 280; *Ex Parte Robinson*, 19 Wall. 504; *U. S.* v. *Toledo Newspaper Co.*, 220 Fed. 458 (affirmed in 237 Fed. 986, C. C. A. 6 Cir.); *in Re Judith Gap Commercial Co.*, 1 Fed. (2d Ser.) 508; *People* v. *Peters*, 305 Ill. 226.

The Supreme Court of California, in *Ex Parte Garner*, 179 Cal. 409, in sustaining the validity of a contempt statute, which authorized the imposition of a fine not ex-

ceeding five hundred ($500) dollars or imprisonment not exceeding five (5) days, or both, said:

> "The Legislature may not, whether by procedural rules, or the inadequacy of the penalty fixed, substantially impair or destroy the implied power of the court to punish for contempt; yet it may provide rules of procedure and fix *the maximum* penalty which, if adequate for the purpose designed, must be deemed operative in controlling the action of the court."

Many of the states have set a maximum penalty for the punishment of contempts, and these have usually been held to be valid, on the ground, that the Legislature has thereby made effective the Constitutional inhibition against the imposition of excessive fines, and the infliction of cruel and unusual punishments. We have searched the statutes of many states, and have been unable to find any statute which fixes a minimum penalty as a punishment for contempt other than so-called liquor statutes, which have for the most part been modeled after the National Prohibition Act. The fixing of a minimum penalty, clearly invades the discretion of the court in carrying into effect its inherent power to punish for contempt. Many instances might be supposed where a nominal fine or a few days in jail would be adequate punishment for the contempt charged. It can well be conceived that the imposition of a minimum fine of five hundred ($500) dollars, under the provisions of Section 24 of the National Prohibition Act, would, in many instances, be a violation of the constitutional provision, forbidding the imposition of excessive fines.

Point III.

Section 24 of Title II of the Prohibition Act Violates the Sixth Amendment to the Constitution.

The Sixth Amendment provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *; to be confronted with witnesses against them * * *."

As demonstrated in the preceding section of this argument, the minimum and maximum penalties of Section 24 do not comport with the plenary power of courts of equity to punish contemnors. If the section is to stand at all, it must stand as a definition of newly created crime to be tried without a jury.

A crime is defined to be "a wrong directly or indirectly affecting the public, to which *the State* has annexed certain punishments and penalties" (16 C. J. 951). What is Section 24 but an attempted definition of a wrong affecting the public to which the government has annexed punishments and penalties? It, therefore, seeks to define a crime of a distinct and separate class from contempt proper.

The section creates a new statutory crime; either that, or it is a manifest invasion of the judicial power. As a newly created statutory crime, it should be properly labeled, e. g., "Obstruction of Justice by Contempt," in analogy to such offenses as were unknown to the common law, but which have since been created and specially designated, e. g., "Larceny by Bailee," "Embezzlement by Agent," etc.

In *Ex Parte, in the Matter of Philip Grossman,* Petitioner, No. 24, Original, October Term 1924, it was de-

cided by this court that contempt of court was an offense against the United States within the pardoning power of the President. Nowhere in the opinion of the court is Section 24 of Title II of the National Prohibition Act referred to. This court, in the *Grossman case,* seems to have treated only of that class of contempts which was known to the common law. It does not seem to have been pointed out to the Court, in that case, that the criminal contempts provided for in Section 24 were, as shown hereafter, unknown to the common law, and to the framers of the Constitution. The conclusion, that common law contempts only were under consideration by the court, we deduce from the use by the court of the words, "common law contempts" and from the reasoning of the court to the effect that "offenses against the United States" included "common law offenses in the nature of contempts against the dignity and authority of United States Courts" and that since the king of England, prior to the Revolution, had power to pardon contempts of court, the framers of our Constitution with the background of the common law and English history in mind, intended, in drafting the Constitution, to include offenses in the nature of contempts, within the scope of the pardoning power of the President. As a predicate for the argument, which we make following, we desire to call the court's attention to two statements from the Grossman opinion—first, "For civil contempts, the punishment is remedial and for the benefit of complainant and a pardon cannot stop it;" second, "while contempt may be an offense against the law and subject to appropriate punishment, certain it is that since the foundation of our government, proceedings to punish such offenses have been regarded as *sui generis,* and not criminal prosecutions, within the Sixth Amendment or common understanding." When this court speaks of contempts as being of-

tion 24, and the proceeding to punish it under Section 24, as a criminal prosecution.

If the contempt provided for in Section 24, is not a common law contempt, and if the proceedings to punish it are "criminal prosecutions," within the meaning of the Sixth Amendment, then certainly Section 24 is unconstitutional, because it provides that the court "may summarily try and punish the defendant."

Is the contempt provided for in Section 24, a common law contempt, and are the proceedings provided for in Section 24 to punish the violation of an injunction, "criminal prosecutions"?

The contempt, so provided for, is not a common law contempt, for the following reasons:

1st. Without Section 24, the court would have the undoubted right to punish a violation of an injunction, issued under Section 22, under the provisions of Section 268 of the Judicial Code, or it would have such right under the common law, pursuant to its inherent power to punish for contempts. But we have demonstrated that such a proceeding would be a civil one, and the contempt involved would be civil, and not criminal. And for civil contempts a fine only could be imposed.

See *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418.

This was likewise the rule at common law.

Moreover, "For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it."

See *Ex Parte, in the Matter of Philip Grossman,* Petitioner, No. 24, Original.—October Term, 1924.

2nd. At common law the defendant in a criminal contempt proceeding had the right to purge himself of the

alleged contempt by filing a sworn denial. In 13 C. J. p. 74, Section 109, it is said:

> "At common law the sworn answer of the accused validly denying the alleged contempt was absolutely conclusive and entitled defendant to be discharged."

See, also, *People* v. *Gilbert,* 281 Ill., p. 619; *People* v. *McDonald,* 314 Ill. 448; *Kirk* v. *U. S.*, 112 C. C. A. 531. But this is not so under Section 24, for as is therein recited, "the trial may be had upon affidavits *or either party* may demand the production and oral examination of the witness."

The proceedings under Section 24 to punish the violation of an injunction issued under Section 22, are criminal prosecutions for the following reasons:

1st. Nowhere in Section 24 is it provided specifically, that the violation of an injunction is or shall be a contempt of court. It provides that "In the case of the violation of any injunction * * * the court * * * may summarily try and punish the defendant." For what? Presumably for the offense of violating an injunction. The offense is tried as a distinct crime. No statute was needed to confer jurisdiction on a court to try an injunction violator for contempt. "The defendant is to be punished" not the *respondent,* and the defendant is to be punished, as later appears in the section, by imprisonment, if the court so wills. The language imports a criminal prosecution. But the section takes it for granted that the trial shall be for contempt, without specifically so providing. The language is this, "The proceedings for contempt shall be commenced by filing, etc."

2nd. The language of Section 24 measures up to the definition of a crime. See 16 C. J. 951 (quoted *supra*). The Government by statute fixes the penalties—a mini-

mum and a maximum—and not the court. The discretion of the court is confined within limits, just as in criminal statutes.

3rd. The violation of an injunction ceases to be what it was at Common Law, and what it was, at and prior to the adoption of the Constitution, viz: a civil wrong or tort, to-wit: a civil contempt, but becomes instead something criminal. That something is a criminal offense, and not a criminal contempt, even though the statute may call it such; it could only be a criminal contempt, if it were directed against the power, dignity or authority of the court; its nature cannot be changed by calling it what it is not. Like the violation of an injunctional order abating a house of ill-fame as a nuisance, its nature is civil. See *People* v. *Buconich,* 277 Ill. 290. The primary purpose of the proceeding, is to enforce the civil remedy of the United States, the complainant in the equity suit, against a defendant, who is the other party to the equity suit. Such proceedings are not brought to vindicate public authority, since, for that purpose, the United States Government has an adequate remedy by enforcing its criminal statutes.

That the contempt is civil in its nature, is recognized by public officials charged with its prosecution. The uniform practice in such proceedings, as it was in this case (Rec., 20, 6), is to institute, entitle and try such proceedings as part of the main cause in equity. This is an important test in determining whether a proceeding be civil or criminal.

Gompers v. *Bucks Stove & Range Co.,* 221 U. S. 418.

4th. At common law, at and prior to the adoption of the American Constitution, the maintenance of a public nuisance was a crime, punishable and abatable in the courts of criminal jurisdiction only. Hence, the effect of

making such an offense punishable and abatable in a court of chancery, is to deprive a defendant of his constitutional right, to have an indictment preferred against him, and a trial by jury. In *Hedden* v. *Hand,* 90 N. J. Eq. 583 (holding a statute unconstitutional, similar to the one here in question), the court said:

> "It is idle to entertain the thought for a single moment that the Legislature can change the nature of an offense by changing the forum in which it is to be tried."

To the same effect see *U. S.* v. *Lot* 29, *Blk.* 29, *Highland Park,* 296 Fed. 729 (holding Sec. 22 unconstitutional and inferentially Sec. 24 also).

5th. Section 24 provides that upon an information filed the court "shall forthwith cause a *warrant* to issue, under which the *defendant* shall be *arrested.*" Here we have the application of a strictly criminal proceeding, viz: "Warrant" and "arrest," not rule to show cause, citation or attachment.

We conclude, therefore, that since the offense mentioned in Section 24, is not a common law contempt, and since it is civil in its nature (—that is, if such offense is treated as a contempt), then it is not within the pardoning power; and if it is not within the pardoning power it is not "an offense against the United States"; yet the United States has imposed criminal penalties; we have also shown that the proceedings under Section 24, to punish the offense of violating an injunction are criminal prosecutions; therefore, the offense mentioned must be a statutory crime.

Point IV.

The Injunctional Order upon which the judgment is founded is absolutely void as District Courts are without power and are expressly prohibited by Equity Rule 73 from granting temporary injunctions without notice.

By Sections 913 and 917 of the Revised Statutes, the Equity Rules are given the same force and effect as Acts of Congress. These rules constitute a part of the Judicial Code. Rule 73 provides:

> "No preliminary injunction shall be granted without notice to the opposite party."

This rule goes to the source of the power of the District Court to enter the injunctional order. Its effect is to prohibit the exercise of the injunctive power without complying with its terms. Unless notice of the application for an injunction be given to the defendant, the District Court is shorn of power to act. Thus the rule goes to the jurisdiction of the court to enter an injunctional order.

It calls for no extended argument to show that an injunction granted by a court without power or jurisdiction to enter it is absolutely void and cannot be the basis of a valid contempt proceeding. A void injunction cannot serve as the basis of a valid judgment finding a party guilty of contempt for violating it.

Drew v. *Hogan*, 26 App. Cas. D. C. 55, 61.

Cathey v. *Norfolk & W. Ry. Co.*, 228 Fed. 26 (C. C. A. 4th Cir.).

Bank of United States v. *White*, 8 Peters 262, 269.

Northwestern Mut. Life Ins. Co. v. *Keith*, 77 Fed. 374.

United States v. *Barber Lumber Co.*, 169 Fed. 184.

The court will note that a temporary restraining *order* was *not* issued in this case. The order here is that of a temporary *injunction* and is in fact so entitled. The language of the order is:

> "It is ordered that pending the final hearing and determination, and until the conclusion of the trial of said bill for injunction against said nuisance, etc." (Rec., 14.)

The record does not disclose, and the government did not attempt to prove that the appellant was notified of the application upon which the injunctional order was based.

Section 22 of Title II of the Prohibition Act provides:

> "An action to enjoin any nuisance defined in this title may be brought in the name of the United States * * * *Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases.* If it is made to appear that such nuisance exists, *a temporary writ of injunction shall forthwith issue.*"

So the recital is that the proceeding under Section 22 "shall be brought and tried as an action in equity." As an "action in equity" the Equity Rules control the procedure; and Rule 73 is positive in its command that:

> "*No preliminary injunction shall be granted without notice to the opposite party.*"

Not a word appears in Section 22 from which even an inference can be drawn, that it is not necessary to notify a defendant of the application for injunction. Even though there were such inference, it would have to yield to the positive declaration of the section, that "such action shall be brought and tried as an action in equity."

Clearly Section 22 provides for a temporary injunction in the usual form of equity procedure—that and nothing more. The settled course of equity procedure in the Fed-

eral courts gave to the petitioners the substantive r
of notice of the application for the temporary injunc
No such notice was given them prior to the entry o
injunctional order.

It follows, that the injunction herein, was entere
violation of Equity Rule 73, by a court expressly
hibited by the said rule and its statutory reaffirma
from entering it without notice to the appellant. T
the entire contempt proceeding was void *ab initio.*

For the reasons stated in this Brief and Argument
respectfully submit that the court below erred in
taining respondents' demurrer and dismissing ap
lant's petition. We respectfully ask this Honor
Court to reverse the decision of the District Court
directions to that Court to reinstate the petition an
overrule the demurrer.

Respectfully submitted,

Thomas D. Mas

Michael J. Th

Counsel for Appella

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OCT 5 1925
WM. R. STANSBURY
CLERK

No. 415.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

TERRENCE DRUGGAN, Appellant,

v.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Reply Brief and Argument for the Appellant.

THOMAS D. NASH,
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REPLY BRIEF AND ARGUMENT FOR THE APPELLANT.

I.

TITLE II OF THE NATIONAL PROHIBITION ACT IS UNCONSTITUTIONAL.

Appellant in his original brief based his contention that Title II of the National Prohibition Act is unconstitutional upon the following proposition:

Major premise: The Eighteenth Amendment went into effect January 16, 1920.

Minor premise: No law grants authority, confer power, or imposes a duty or obligation until it goes int effect.

Conclusion: Therefore Congress, which passed Tit II of the National Prohibition Act on October 28, 191 had no power or authority to legislate with respect t prohibition until the Eighteenth Amendment went int effect on January 16, 1920.

Appellees, in their argument (p. 5), attack only th major premise, and thereby concede the minor premis the truth of which has been amply demonstrated by ap pellant under Point I-A of his argument (p. 9), and th authorities there cited and quoted from (pp. 13 to 21 They thereby concede, also, that this court has not here tofore passed upon the validity of Title II on the poi here urged. (See Appellant's Argument, p. 22.)

If, therefore, the major premise of the above propos tion be true, which alone is disputed by appellees, must follow necessarily that the conclusion of that pro osition is true, and, if so, that Title II of the Nation Prohibition Act is unconstitutional. Appellees hav therefore, narrowed the issue on this point to appe lant's major premise.

Appellees contend that appellant's major premise i based on a misconception of the language used by th court in *Dillon* v. *Glos*, 256 U. S. 368 (Appellee's Argu ment, p. 5.) In endeavoring to explain the nature this alleged misconception, they say (p. 6),

> "It is plain that this court in using * * * the language, 'was to go into effect one year aft being ratified,' referred to the time the prohibitio contemplated by the amendment should become e fective, that is, when intoxicating beverages shou be outlawed."

Appellees, by this statement, would have us believe, th

this court meant something other than what it said, when it used plain, unequivocal terms, viz.:

> "* * *, the latter (the Eighteenth Amendment) by its own terms was to go into effect one year after being ratified."

This court drew no such subtle and refined distinction, between the prohibition contemplated by the Amendment and the Amendment itself, as appellees so naively attribute to the court. Appellant in his brief anticipated this argument of appellees and there showed (p. 31), that the prohibition contemplated by the Amendment is not one thing, and the Amendment itself another thing, but that the prohibition *is* the Amendment, and the Amendment *is* the prohibition, and further showed (p. 32), that the Amendment did not merely fix a time in the future for the inhibition of intoxicating liquors, and that it was not the supreme law of the land until January 16, 1920. To illustrate further, the argument there advanced (p. (32) let us suppose that in the month of February, 1919, subsequent to the ratification of the Eighteenth Amendment, January 16, 1919, but before its effective date, January 16, 1920, and also prior to the passage of Title II of the Prohibition Act, October 29, 1919, a citizen had sold intoxicating liquor for beverage purposes. Concededly, if the Eighteenth Amendment went into effect when ratified, he would be guilty of a violation of the Constitution even though, of course, subject to no penalty. One may transgress a provision of the Constitution without being guilty of a specific crime and without incurring a penalty, where the transgression has not been defined by Congress to be a crime. But will anyone say that the citizen who thus sold liquor in the month of February, 1919, violated the Eighteenth Amendment by so doing? If he did not, then the Eighteenth Amendment was not at that time the supreme

law of the land. If it was not supreme law for that purpose, it was not supreme law for any purpose, and hence Congress could receive no power under it, until it became supreme law.

While appellees make the naked statement, that the language of *Dillon* v. *Glos,* referred to the time when prohibition should become effective, and not to the Amendment itself, they have failed wholly to point out to the court wherein the argument of the appellant (pp. 31 to 33) on that point, is unsound or unreasonable.

We do not see how the language of Section 1 of the Eighteenth Amendment is susceptible of any other construction than that placed upon it by this court in *Dillon* v. *Glos.* That section does not say that the manufacture, sale or transportation of intoxicating liquors is *now* prohibited, or is prohibited *upon* ratification, but says that *after one year* it is prohibited. In other words, one year must elapse after ratification before it is prohibited. If appellant has misconceived the language of this court in *Dillon* v. *Glos,* so also then has the Supreme Court of Florida misconceived it. See excerpt from *Neisel* v. *Moran,* 80 Fla. 98, quoted in appellant's argument (p. 17).

Appellees next urge Article V of the Constitution as an answer to appellant's contention, and say (p. 6), that by virtue of this article, the Eighteenth Amendment upon ratification January 16, 1919, "then became 'valid to all intents and purposes,' as part of the Constitution." Appellant in his argument anticipated this objection and there fully answered it. (pp. 24 to 30.) Appellees have not seen fit to answer appellant's argument on this objection, possibly, because they cannot escape the conviction, that they are unable to do so successfully, but have contented themselves with the bar

assertion, that by virtue of Article V, the Eighteenth Amendment became effective immediately upon ratification. They then say, "and Congress and the several States thereupon had concurrent power under Section 2 of the Amendment to provide for its enforcement."

No one disputes the fact that the several States had power on January 16, 1919, to enact prohibition statutes. That power, however, was not then derived from the Eighteenth Amendment, but theretofore and then existed, because of an inherent plenary power residing in the several states, to pass any law, not forbidden by the Constitution of the United States, or by the Constitution of the particular state which sought to exercise the power. Likewise, if the Eighteenth Amendment became effective immediately upon ratification, then no one disputes, but that Congress, as appellees say, "thereupon had * * * power under Section 2 of the Amendment to provide for its enforcement." But, if the Eighteenth Amendment did not become effective immediately upon ratification, as appellant contends, then Congress did not, at the time of ratification, receive power under Section 2 to provide for its enforcement, as demonstrated by appellant in his argument. (p. 34.)

In concluding their argument on this point, appellees say, "The bill (referring to Title II of the National Prohibition Act) was passed over the veto of the President on October 28th, 1919, and thereupon became law, though its provisions did not 'go into effect' until January 16th, 1920." The statement that the bill "thereupon became law" begs the entire question here presented. The further statement, "though its provisions did not 'go into effect' until January 16th, 1920," is tantamount to an admission that the Eighteenth Amendment itself did not go into effect until January 16, 1920, because such statement is based on the language of Sec-

tion 3 of Title II and Section 21 of Title III of the National Prohibition Act, both of which clearly express the construction and interpretation placed by Congress, upon the Eighteenth Amendment (which had then been ratified) with reference to the date when it should become effective. These sections are:

Section 3, Title II.

> "No person *shall* on or after *the date* when the Eighteenth Amendment to the Constitution of the United States *goes into effect,* manufacture, sell * * * intoxicating liquor, etc., etc."

Sec. 21, Title III.

> "Titles I and III and Sections 1, 27, 37 and 38 of Title II of this Act shall take effect and be in force from and after the passage and approval of the act. The other sections of Title II shall take effect and be in force *from and after the date when* the Eighteenth Amendment to the Constitution of the United States *goes into effect.*"

By the provisions of Section 21, Titles I and III and Sections 1, 27, 37 and 38, of Title II, became effective immediately upon the passage of the act. The authority of Congress, to make these titles and sections effective immediately, was derived from its war powers. Congress recognized that it received no power from the Eighteenth Amendment to make the other sections of Title II effective immediately, because that Amendment had not yet gone into effect. It failed to observe, however, that until the Amendment actually went into effect, it had no power at all to enact the other sections of Title II; that, since it could not make them effective immediately, it could not make them effective at all, until power was vested in it by the Constitution. Congress may legislate, only where authority to do so has been granted by the Constitution. In whatever instances under the Constitution it has the right to legislate, it has

ipso facto the right to make its legislation effective immediately.

If it has not the right to make its legislation effective immediately, then, *ipso facto*, it has not the right to legislate; and if it has not the right to legislate, then it has not received authority to do so from the Constitution.

II.

SECTION 24 OF TITLE II IS AN INVASION OF THE JUDICIAL POWER.

Counsel have failed to cite a single case wherein a statute, containing a minimum penalty for contempt, has ever been sustained against the objection raised by the appellant in this cause. True, there are liquor statutes in several of the states (as shown by the compilation in appellees brief) containing such provisions. But there is no reported case, that we know of, passing upon the precise point raised in the instant case. If properly tested, the statutes in appellees' compilation might be found to be subject to the same infirmity, as is here urged against Section 24.

We submit that the decisions cited in the opposing brief, strengthen and confirm the correctness of our contention, that the minimum limitation of punishment, as defined in Section 24 of Title II, is an invasion of the inherent powers of courts of equity to punish for contempts of their authority.

Let us, therefore, proceed to an exposition of the rulings in the three decisions cited under this division of appellees' argument.

True, *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, involves an Iowa liquor statute containing a minimum and maximum penalty provision. Neither the opinion in

the *Eilenbecker* case, nor the excerpts from the briefs of counsel included by the official reporter of this court, show that any point was presented on the validity of the statute there involved, because of the definite maximum and minimum penalty, imposed upon contemnors thereunder. In that case this court held substantially at page 36 (134 U. S. 31), that the Iowa statute was a reaffirmation of the inherent power of State courts to punish for contempts according to the course of the common law. The District Courts of the United States, however, do not possess this inherent power according to the common law. They are created by Congress, and owe their inherent power to the act of their creation, as that power has been limited and defined by the Act of 1831, now Sec. 268 of the Judicial Code. *Ex parte Robinson,* 19 Wall. 505. 510. Under this act they have power to punish for contempt by fine *or* imprisonment, not both. Also under this act, they are not limited in the extent of the fine or imprisonment to be imposed.

Sec. 24 of Title II, however, seeks to invade the inherent power defined by Sec. 268 of the Judicial Code by changing this power, to the extent of allowing punishment by both fine and imprisonment, and by limiting that power in the infliction of such punishment to a maximum and minimum.

Mugler v. *Kansas,* 123 U. S. 623, did not fix a minimum and maximum penalty for contempt, or for the violation of an injunction, as stated by appellees at page 10 of their argument. The statute there involved merely provided for the abatement in equity of a nuisance, and fixed a penalty upon conviction of one found guilty of maintaining such nuisance. Neither the Kansas statute (Compiled Laws of Kansas (Dassler), 1881, Paragraph 2150, 2162) nor the decision in the *Mugler* case had anything to do with contempt, or the inherent power of courts to punish therefor.

In *Michaelson* v. *United States,* 266 U. S. 42, this court sustained the constitutionality of the provision of the Clayton Act (Sections 21 and 22), granting a jury trial in contempt proceedings thereunder for "wilful disobedience of any writ, * * * if such act or thing be of such character, as to constitute also a criminal offense under any statute of the United States, or law of any state in which the act is committed." Mr. Justice Sutherland there observes:

> "The statutory extension of this constitutional right to a class of contempts which are properly described as 'criminal offenses' does not in our opinion, invade the powers of the courts as intended by the Constitution, or violate that instrument in any other way."

How appellees find comfort in the *Michaelson* case we fail to understand. Nothing in the Clayton Act establishes or defines a minimum penalty for contempt. The only limitation is a maximum of six months imprisonment and/or a $1,000 fine. At page 41 of our opening brief we specifically stated:

> "Many of the states have set a maximum penalty for the punishment of contempts, and these have usually been held to be valid, on the ground that the Legislature has thereby made effective the Constitutional inhibition against the imposition of excessive fines, and the infliction of cruel and unusual punishments."

The jury provided for by Sections 21 and 22 of the Clayton Act finds neither the extent of the sentence nor the amount of the fine. All that the jury passes upon is the fact question of the contemnor's guilt or innocence. It remains with the chancellor to impose punishment, without a minimum limitation, as he, in his sole discretion, sees fit up to a fine of $1,000 and/or a sentence of imprisonment for six months. Thus Section 22 of the Clayton Act is a measure designed for the protection of a respondent to a contempt charge.

Appellees have wholly failed to reply to the distinction for which we contend: That Congress may restrict or limit the class of cases wherein the contempt power may be exerted, but that Congress may not in the class of cases where the contempt power may be exerted, interfere with the plenary power of courts of equity to assess punishment upon contemnors, by superseding the discretion of a chancellor with a statutory minimum of punishment without regard to the degree of the contemnor's fault.

That appellant received the maximum sentence and fine under Section 24, is no argument in favor of its validity. As the maximum penalty is provided for, in a statute which is void, because of its inclusion of a minimum penalty, the greater must fall with the lesser.

III.

SECTION 24 OF TITLE II OF THE NATIONAL PROHIBITION ACT VIOLATES THE SIXTH AMENDMENT TO THE CONSTITUTION.

A federal court of equity has power, independently of statute, to punish a contemptuous violation of an injunctional order. But when it so undertakes to act, it is governed by Section 268 of the Judicial Code:

> "* * * to punish, by *fine or imprisonment*, at the discretion of the court, contempts of their authority."

So that under the Code a court may not punish by *both* fine *and* imprisonment.

In the instant case there are both maximum fine and maximum imprisonment. Hence it follows, that sentence and fine must be held to be founded upon Section 24 of Title II of the Prohibition Act; for, without that statute, there could be no legal foundation for both fine *and* imprisonment.

We readily admit that a jury is not necessary where the court acts, independently of statute, by virtue of its inherent plenary capacity to punish a contemnor. But we do contend that where the alleged contempt is the violation of a statute, creating an offense punishable by *both fine and imprisonment,* with minimum and maximum limits, that the mere designation "contempt of court" does not change the nature of the offense, which, through all variant nomenclature, remains but a statutory crime.

The Act of 1831, specifying the instances where the contempt power may be exerted, limited the exertion of that power to a class of cases, as to which, the District Courts were given power to vindicate their authority by fine or imprisonment, not by both.

Mugler v. *Kansas,* 123 U. S. 623, 672, did not involve a contempt statute, and the excerpt from Mr. Justice Harlan's opinion (appellees' argument, p. 17) did not refer to such a statute; that case merely decided that jury trials were not required in equity proceedings to abate a nuisance, which we concede to be good law.

Eilenbecker v. *Plymouth County,* 134 U. S. 31, 39, we have already shown is not applicable to federal power; that it merely recognizes the Iowa statute, as being confirmatory of the inherent power of the State courts to punish for contempts, according to the course of the common law; that the attempted power sought to be granted by Sec. 24 of Title II is an invasion of the inherent power of the Federal District Courts, as such power has been limited and defined by Sec. 268 of the Judicial Code, or else, that Sec. 24 defines a crime by fixing a minimum and maximum penalty, or at least an offense, in the nature of contempt, unknown to the common law and to the framers of the Constitution, and, therefore, within the purview of the Sixth Amendment.

The other cases, cited by appellees on page 12 of their brief, do not sustain their contention.

In *Myers* v. *United States,* 264 U. S. 95, the injunction restrained strikers from interfering with men at work. An equity court may always do that upon a proper showing. Though the Clayton Act was involved, the provision of that act, under which injunctive relief was had, is but declaratory of the principles of equity jurisprudence. No objection was made to the provisions of Section 22 of the Clayton Act, authorizing a maximum punishment by both fine and imprisonment, and this court did not pass upon that point.

All that the court decided in the *Myers* case, *supra,* was, that Section 53 of the Judicial Code did not apply to either civil or criminal cases, and that contempt, for violation of an order of court, may be punished in the division of a district in which the order was entered, although disobedience occurred in another division.

In the nature of things, contempt being an offense against the authority of a court, the venue of the offense is the court whose dignity was assailed. The contemnor is constructively present in court when he violates its orders.

In *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, this court sustained the constitutionality of the 12th section of the Interstate Commerce Act, relating to the authority of the Circuit Courts, to use their process in aid of inquiries before the Commission. What is there said, about jury trials not being required in contempt cases, does not refer to statutory contempts but to the inherent plenary power of a court to vindicate its own authority.

In *Ex parte Terry,* 128 U. S. 289, the contemnor was imprisoned but not fined. And that well-known case is

a clear example of the exercise of the inherent plenary power of any court of record to punish a breach of the peace in open court.

In re Debs, 158 U. S. 564, and *Gompers* v. *Bucks Stove Company*, 221 U. S. 418, were not dependent upon a statute, and the punishment assesed in each of those cases was imprisonment without a fine.

The fact that certain of the lower federal courts have ruled to the contrary on this provision, and that the question has been raised in so many different ways, should, we respectfully submit, commend itself to your Honors, as calling for an expression of opinion that will set at rest all doubts in the construction of this statute.

The Solicitor General says, at page 14 of appellees' brief:

> "Cases, in which this question has been decided adversely to the claim now made, have been presented to this court, upon petitions for writs of certiorari and uniformly the petitions have been denied."

But the denial of a petition for a writ of certiorari is not equivalent to an affirmance. As well said by Mr. Justice Pitney in *Hamilton-Brown Shoe Co.* v. *Wolf Bros. Co.*, 240 U. S. 251, 258:

> "It is, of course, sufficiently evident, that the refusal of an application for this extraordinary writ (certiorari) is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

Appellees have made no answer to the argument of appellant, under Point III of his argument (p. 42), to the effect that the offense defined by Sec. 24 is something other and different from "contempt," properly so called, as they were known to the common law, and contemplated by the framers of the Constitution. Appellees have not disputed that Sec. 24 changes what was there-

tofore a civil offense, into a criminal one, and that the offense defined by Sec. 24 does not come within the purview of the power, known as the inherent plenary power of the courts.

IV.

THE INJUNCTIONAL ORDER UPON WHICH THE JUDGMENT IS FOUNDED IS ABSOLUTELY VOID AS DISTRICT COURTS ARE WITHOUT POWER AND ARE EXPRESSLY PROHIBITED BY EQUITY RULE 73 FROM GRANTING TEMPORARY INJUNCTIONS WITHOUT NOTICE.

Appellees, by way of reply to our argument on this point, present *McFarland* v. *United States*, 295 Fed. 648, wherein the Circuit Court of Appeals for the Seventh Circuit, follows one of its earlier decisions (*Lewinsohn* v. *U. S.*, 278 Fed. 421), and decides against our contention. But your Honors will note that that court specifically states (649):

> "That there is a repugnancy between Section 22 of this latter act and equity rule No. 73 and Section 17 of the Clayton Act *must be conceded.*"

Notwithstanding the expressed intent of Congress found in the language of Section 22, Title II of the Prohibition Act, that "*Such action shall be brought and tried as an action in equity* and may be brought in any court having jurisdiction to hear and determine equity cases," the Court of Appeals in the *McFarland* case, presents the following novel thought, as to what Congress had in mind by enacting the above quoted provision (649):

> "It is also apparent, we think, that it was the obvious and the expressed intention of Congress, in enacting the National Prohibition Act, to make an exception to the general rule, and prescribe a specific code of practice or procedure which govern equity suits authorized by the act to be brought to abate nuisances."

The Equity rules have the force of statutes. If it were the intention of Congress, that Equity proceedings under the Prohibition Act should not be subject to the Equity Rules, it would have been an easy mater to have so said.

CONCLUSION.

As stated by Mr. Justice Holmes, in *Chin Yow* v. *United States*, 208 U. S. 8, 13:

> "Habeas Corpus is the usual remedy for unlawful imprisonment."

Here we are assailing a judgment based upon a statute, which we contend is unconstitutional. So, too, we contend that the court which entered the judgment had no jurisdiction of the subject matter.

Says Mr. Justice Bradley, in *Ex parte Siebold*, 100 U. S. 399:

> "The only ground on which this court, or any court, without some special statute, authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court, is want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. * * * The validity of the judgment is assailed, on the ground that the Acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law, that the judgment of an inferior court affecting it is not deemed so conclusive, but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or

judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon those laws."

The authority of the District Court to proceed with the injunction in the instant case was dependent upon Equity Rule 73 requiring notice of the entry of a temporary injunction. And the injunctional order together with the judgment convicting appellant of contempt, is based upon Title II of the National Prohibition Act, and also upon Section 24 thereof, both of which are unconstitutional and void.

Again we respectfully pray, that this Honorable Court reverse the decision of the District Court for the Northern District of Illinois, Eastern Division, with directions to that court to reinstate the petition, and to overrule the demurrer.

Respectfully submitted,

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